
(2007) 06 CAL CK 0026

In the Calcutta High Court

Case No : Writ Petition No. 10722 (W) of 2007

Ainul Haque and Others

APPELLANT

Vs

State of W.B. and Others

RESPONDENT

Date of Decision : 18-06-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11

Citation : (2007) 4 CHN 35

Hon'ble Judges : Dipankar Datta, J

Bench : Single Bench

Advocate : Dinabandhu Chowdhury and Iresh Paul, for the Appellant; Debabrata Karan, Mrinal Kanti Das and Subhabrata Das for respondent No. 11, Jaweed Yusuf, for respondent No. 7, Samiran Mondal and Sudipta Panda, for the Respondent

Judgement

Dipankar Datta, J.—The petitioners are aggrieved by the order dated 24.4.2007 passed by the Chairperson, Bankura Municipality. By the said order, complaint lodged by the petitioners was disposed of in purported compliance with the order passed by Justice Jyotirmay Bhattacharya on 6.11.2006 in W.P. No. 20047(W) of 2006, thereby permitting the private respondents to raise construction in the manner mentioned in it.

2. The petitioners along with some others had moved W.P. No. 20047(W) of 2006 raising a grievance that their complaint in relation to unauthorized construction being raised by the private respondents had not been considered by the Bankura Municipality. The said writ petition was disposed of by His Lordship with a direction upon the Municipality to consider the grievance of the petitioners as contained in their complaint by passing a reasoned order after giving a reasonable opportunity of hearing to the petitioners as well as the private respondents within four weeks from date of communication of the said order. The Municipality was permitted to make inspection of the site if necessary upon notice to the parties. The private respondents were restrained from raising any

construction until consideration was made by the Municipality in terms of the said order.

3. Mr. Chowdhury, learned Counsel appearing for the petitioners has invited the attention of this Court to the order passed by the Chairperson of the Municipality dated 6.12.2006. It appears therefrom that after hearing the petitioners and the private respondents, a request was made by the Chairperson to the private respondents to submit a modified proposed map for constructing on the second and third floors of the existing structure on Plot No. 804. It is the petitioners' grievance that thereafter a modified plan appears to have been submitted by the private respondents which, however, was never supplied to them, and without hearing them on such modified plan allegedly furnished by the private respondents, the order dated 24.4.2007 was passed by the Chairperson. Mr. Chowdhury further submits that this order is in the teeth of the order dated 6.11.2006 passed by this Court wherein it was made clear that the complaint of the petitioners had to be considered and disposed of after giving them reasonable opportunity of hearing. It is his contention that during the period intervening between submission of the modified plan by the private respondents and passing of the impugned order, the petitioners were kept absolutely in the dark and by misusing and abusing her power, the Chairperson has passed the impugned order. He has, accordingly, prayed for stay of operation of the order passed by the Chairperson and for restraining the private respondents from raising construction till disposal of this petition.

4. Mr. Das, learned Senior Counsel appearing for the private respondents has questioned the maintainability of the writ petition on the following grounds:

i) The petitioners have no locus standi to present the writ petition; and

ii) The petitioners have suppressed material facts in this petition. Elaborating on this point, he has submitted that two of the four petitioners herein have approached the Court of the learned Civil Judge, (Junior Division), 1st Court, Bankura by filing Title Suit No. 104 of 2006 wherein they have prayed for the following relief:

a) That a decree for declaration to the effect that the property as specifically mentioned in the Schedule (A) of this plaint is the exclusive property of Wakf property and the Bankura Zilla Juma Mosjid is the law fully owner and title holder of the said property and it is the part and parcel of Abdur Rahim Ali Wakf Estate vide E.C. No. 1749-A and these principal-defendant Nos. 1&2 are illegally making construction of building by encroaching the portion of plot No. 805 as specifically mentioned in the Schedule (C) of this plaint.

b) That a decree for permanent injunction against these principal defendant Nos. 1&2 directing them to deliver vacant possession of the (A) Schedule property by removing the encroachment by demolishing the illegal construction of building over the (C) Schedule property.

c) That a decree for permanent injunction against these defendant Nos. 1&2 restraining them from making any sort of constructing in the said property as specifically mentioned in the Schedules (A) and (C) of this plaint.

d) That a decree for cost.

c) That a decree for any other relief or reliefs as the learned Court may deem fit and proper.

5. It is his specific submission that after filing of the said suit, the plaintiffs in connection therewith had prayed for temporary injunction which was refused by an order dated 4.4.2007. According to him, the petitioners by not disclosing these facts in the present petition sought to derive undue advantage and these facts which are material and vital having been suppressed, the petitioners are not entitled to discretionary relief.

6. On merits he has submitted that the Chairperson of the Municipality committed no wrong in passing the order placing reliance on the modified plan, since the Chairperson concluded that the petitioners had not raised constructions which were in material deviation from the plan already submitted. He has, accordingly, prayed for dismissal of the writ petition.

7. Mr. Das, learned Senior Counsel has referred to the Division Bench decision reported in Lalit Mohan Mitra and Others Vs. Samirendra Kumar Ghosh and Others, for the proposition that if the action of the private respondents do not amount to actionable nuisance, no action can be started against the defendants ad injunction cannot be prayed.

8. Mr. Yusuf, learned Advocate representing the Wakf Board, submitted that the entire property on which construction is being raised by the private respondents is Wakf property as a result whereof the Board has since initiated enquiry for the purpose of ascertaining the actual state of affairs and the report in this regard would be submitted by the competent enquiring authority within two weeks from date.

9. Mr. Mondal, learned Advocate representing the Municipality has supported the order impugned by contending that the Chairperson has lawfully exercised her discretion while accepting the modified plan submitted by the private respondents and by directing them to raise construction in the manner indicated in the order.

10. Mr. Chowdhury, learned Counsel representing the petitioners has countered the submission of Mr. Das, learned Senior Counsel representing the private respondents in relation to maintainability of the writ petition by submitting that the question of locus standi of the petitioners to maintain a writ petition against inaction of the Municipality to take steps in accordance with law or to permit unauthorized constructions to be retained is no longer res integra inasmuch as it has been decided by the Division Bench of this Court in the decision reported in 1979(1) CLJ 489 that each and every elector of a particular Municipality would

have the right to question any action of the said Municipality which is ultra vires. The petitioners being persons having the right to vote in Municipal election, he contended that the petitioners had the locus standi to question the order of the Chairperson.

11. Referring to the objection of suppression of material facts raised by Mr. Das, Mr. Chowdhury has relied on the decision of the Apex Court in *S.J.S. Business Enterprises (P) Ltd. Vs. State of Bihar and Others*, . He has also referred to the plaint filed before the learned Civil Judge and has contended that the subject-matter of the suit is illegal encroachment of property of the Masjid whereas the issue before this Court is different i.e. passing of an order by the Chairperson not in accordance with the order passed by this Court in relation to raising of construction in deviation from the sanctioned plan. According to him, non-disclosure of the factum of filing of suit by the petitioners and rejection of application for temporary injunction do not amount to suppression of material facts which would otherwise have an effect on the merits of the decision to be given by this Court since this Court has been called upon to examine as to whether the decision making process leading to the ultimate order of the Chairperson suffers from illegality, irrationality and procedural impropriety or not. The issue involved in this writ petition in no manner being dependent on the factum of filing of suit, according to him, the objection raised by Mr. Das is without merit.

12. Having heard learned Counsel for the parties and considering the facts and circumstances of this case, this Court of the considered view that the preliminary objections are devoid of merit and hence must fail.

13. Regarding the objection of locus standi raised by Mr. Das, this Court is of the considered view that the objection is barred by the principle of constructive res judicata. The private respondents could have raised this objection of lack of locus standi before this Court when W.P. No. 20047(W) of 2006 was taken up for consideration. However, not having raised this point at the time the said writ petition was disposed of, the said objection cannot be raised now in view of the principle underlying Section 11 Explanation IV of the Civil Procedure Code.

14. That apart, this Court is convinced that the petitioners being the members of a particular community having a place of worship adjacent to the site where unauthorized construction allegedly has been raised would have the necessary locus standi to impugn failure of the Municipality to discharge a duty which it owes to the public at large, i.e. to keep the area within its jurisdiction free from constructions raised either without sanction or in deviation of sanction or in contravention of the building laws. The decision cited by Mr. Das has no application on facts and in the circumstances of this case. The objection thus stands overruled.

15. This Court has considered the objection relating to suppression of material facts, vehemently urged by Mr. Das. Upon consideration of the rival submissions,

this Court agrees with Mr. Chowdhury, learned Counsel for the petitioners, that the issue which arises for determination before this Court is as to whether in passing the impugned order, the Chairperson had adhered to the direction contained in the order dated 6.11.2006 passed by His Lordship.

16. It appears from the said order that the objection of the petitioners was directed to be disposed of after giving a reasonable opportunity of hearing to the petitioners as well as the respondent Nos. 10 and 11 positively within a period of four weeks from the date of communication of the same.

17. No doubt the petitioners were given an opportunity of hearing before the order dated 6.12.2006 was passed by the Chairperson whereby the private respondents were directed to submit modified map for construction of 2nd and 3rd floors. It is not disputed by Mr. Mondal, learned Counsel appearing for the Municipality, that after submission of such modified plan, petitioners were neither given hearing nor were they furnished the modified plan. It is settled law that when an authority performing quasi-judicial function decides a lis one way or the other, it cannot take into consideration or rely on any document of material unless the same is furnished to the person against whom the order is sought to be passed. This salutary principle has been ignored by the Chairperson while passing the impugned order. That apart, by not granting opportunity of hearing to the petitioners after the modified plan was submitted by the private respondents, the Chairperson has disobeyed the direction contained in the order dated 6.11.2006.

18. Having regard to the above, in the considered view of this Court the impugned order dated 24.4.2006 cannot be sustained in law and the same is liable to be set aside. Since the parties have agreed to final disposal of the writ petition at this stage, this Court proceeds to pass the following directions:

- 1) The impugned order dated 24.4.2007 stands set aside;
- 2) By 2nd July, 2007 the Chairperson of the Municipality shall furnish to the petitioners copy of the original plan as well as the modified plan submitted by the private respondents. For this purpose, liberty is given to the petitioner No. 1 to contact the Chairperson who shall hand over the same to him within the time fixed above.
- 3) The Chairperson of the Municipality shall afford opportunity of hearing to both the petitioners as well as the private respondents afresh. For this purpose a hearing shall be conducted by the Chairperson on 9th July, 2007 in her office chamber at 12 noon. No further notice shall be given to the parties.
- 4) If any party chooses not to appear before the Chairperson on the date fixed above, the Chairperson shall be at liberty to proceed ex parte.
- 5) It shall be open to the parties to agitate all points before the Chairperson at the time of hearing. By 20th July, 2007, the Chairperson of the Municipality shall pass a reasoned order after hearing the parties, which shall be communicated to

the parties immediately thereafter.

6) Till such time a decision is given by the Municipality in terms of this order, the private respondents shall remain restrained from raising any further construction.

19. If no decision is communicated to the parties by 20th July, 2007 by the Chairperson of the Municipality in terms of this order, the parties shall be at liberty to mention this writ petition for securing effective compliance of this order.

20. Subject only to the aforesaid liberty, the writ petition stands disposed of without any order for costs.

21. Urgent xerox certified copy of this order, if applied for, be supplied to the parties as quickly as possible.